

Esco Elevators, Inc. and International Union of Elevator Constructors, Local 21. Case 16-CA-9551

26 August 1983

DECISION AND ORDER

**BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER**

On 12 February 1982 Administrative Law Judge Wallace H. Nations issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and has decided to affirm the rulings, findings, and conclusions, as further explained herein, of the Administrative Law Judge, and to adopt his recommended Order, as modified.

The Administrative Law Judge found that employee Charles McKinney was discharged for his union activities and activities toward improving the safety and working conditions on the Employer's jobs; and that the Employer's district manager, Payne, seized upon the fight between McKinney and employee Crouch as a convenient excuse for firing McKinney. We agree.

Respondent contends that it discharged McKinney for striking the first blow in a fight with fellow employee Marshall Crouch. This argument, however, ignores several established facts. The record shows, and the Administrative Law Judge found, that Crouch was the instigator of the incident, was spoiling for a fight, and engaged in two altercations that afternoon in quick succession: first, with McKinney, after Crouch had used abusive and threatening language, and the other immediately following with employee Stroud. During this period, District Manager Payne was absent from the office, but, upon being informed of the fights on his return, replied that he "wondered when these boys are going to grow up." Later in the afternoon he asked employee Boring, "Who struck the first blow?" but said nothing further. That evening he went by Crouch's house to check on his condition.

Thereafter Payne reported the matter to Vice President Young who ordered Payne to conduct an investigation. The following Monday Payne discussed the fight with Crouch. This discussion with Crouch was the only investigation that Payne conducted until after McKinney was fired. Payne did

not discuss the matter with Stroud, or with McKinney, the other participant.¹ Nor was Crouch, who had engaged in two fights the same day, ever disciplined in any way. To the contrary, shortly thereafter Crouch was given a substantial raise in pay.

The disparate treatment shown Crouch and McKinney dates back to the expiration of the union contract in June 1980, when Crouch was the only employee who did not participate in a union-sponsored "park and walk." At that time, when the parties were at a stalemate in their negotiations, and without a contract, the employees, most of whom utilized their cars for company business and were subsequently reimbursed, drove their vehicles to work, parked them in the company lot, and refused to use them on company business. McKinney and a fellow employee, who drove company trucks as a rule, refused to work unless they were permitted to transport fellow employees to jobsites, but Payne refused. This was McKinney's first public exposure as Local president and spokesman and Payne's first experience in dealing with McKinney in that capacity.

The record further shows that Payne assisted Crouch, whose work was termed "marginal" by Service Supervisor Hueber, when Crouch had trouble adequately performing on the job; and that several times when Crouch could not be reached during working hours Payne called Crouch at home to indicate he was needed, and should be, on the job.

The record is clear that McKinney was considered by Respondent to be an "undesirable employee" because of his union activities and his repeated complaints about safety violations.² The fight between Crouch and McKinney provided Respondent with a convenient excuse to rid itself of an employee whose union and protected activities had become a definite annoyance.

¹ The Administrative Law Judge failed to make explicit his credibility findings with respect to the conflicting testimony of McKinney and Payne. It is clear, however, from a reading of the Decision that the Administrative Law Judge implicitly resolved this conflict by discrediting Payne's testimony that he received McKinney's version of the fight before deciding to discharge him. We have carefully examined the record and find no basis for reversing the Administrative Law Judge's credibility findings.

² In addition to the individual complaints made by McKinney with respect to the safety problems at the Lakeland Manor jobsite, we note that McKinney brought up the issue at a meeting of management and employees which was called to discuss problems servicemen were having. We also note that McKinney raised the safety issue with representatives of Union, and that one of these representatives also presented the safety issue to Respondent. McKinney also testified without contradiction that other employees went out to site, and that he was speaking on their behalf. Also, McKinney had run for president of the Union on a campaign platform which stressed improving safety conditions for employees in the local.

Accordingly, we find, as did the Administrative Law Judge, that, by discharging McKinney, Respondent has violated Section 8(a)(1) and (3) of the Act.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Esco Elevators, Inc., Fort Worth, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the discharge of Charles McKinney on 5 December 1980, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him."⁴

2. Substitute the attached notice for that of the Administrative Law Judge.

³ See *Staats & Staats, Inc.*, 254 NLRB 888 (1981).

⁴ *Sterling Sugars*, 261 NLRB 472 (1982).

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice

- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

- To refrain from the exercise of any or all such activities.

WE WILL NOT discharge or otherwise discriminate against our employees in regard to hiring or tenure of employment or any term or condition of employment because they engage in activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT discharge our employees or in any like or related manner interfere with, restrain, or coerce employees in the exercise of

their rights to engage in or refrain from engaging in any or all of the activities specified in Section 7 of the Act.

WE WILL offer Charles McKinney immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any losses suffered by reason of our unlawful conduct, with interest.

WE WILL expunge from our files any reference to the disciplinary discharge of Charles McKinney on 5 December 1980, and WE WILL notify him that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

ESCO ELEVATORS, INC.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge: Upon a charge brought on December 8, 1980, by International Union of Elevator Constructors, Local 21 (herein the Union), the complaint issued on January 16, 1981. The complaint alleges that Esco Elevators, Inc. (herein Respondent), violated Section 8(a)(1) and (3) of the Act by discharging its employee Charles McKinney.

A hearing was held on September 8 and 9, 1981, at Fort Worth, Texas, and post-hearing briefs were received from all parties.

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

1. THE BUSINESS OF RESPONDENT

Respondent is a Texas corporation with an office and principal place of business located at Fort Worth, Texas, and a branch office and place of business located at Euless, Texas, where it is engaged in the manufacturing, sale, and installation of hydraulic passenger and freight elevators as well as the repair and servicing of elevator installations when completed. During the past fiscal year, Respondent received goods, materials, or services valued in excess of \$50,000 directly from suppliers located outside the State of Texas and sold products and/or performed services valued in excess of \$50,000 directly to customers outside the State of Texas. I find that Respondent is an employer within the meaning of the Act and it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Elevator Constructors, Local 21, is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Information

Charles McKinney began his employment with Respondent in July 1974 and worked continuously until his discharge on December 5, 1980, with the exception of the period from May 3, 1977, until May 17, 1978. The 1977-78 break in service was a result of McKinney's resignation to work for another elevator company. In May 1978, he applied for reemployment with Respondent and was hired by Glenn Young, Respondent's vice president of field operations, as a route service mechanic, which entailed the inspection of existing elevators on customers' property and making adjustments, corrections, and replacements of worn parts on a regular basis. On his return to employment by Respondent in 1978, he was under the supervision of Service Supervisor Larry Huber and District Manager Jack Payne. At the time of his discharge, his earnings were \$11.14 an hour and his normal workweek was Monday through Friday from 8 a.m. to 5 p.m. However, McKinney and other route service mechanics were subject to call outside of regular working hours.

B. McKinney's Union and Protected Activities

At all times pertinent, the Union was the certified bargaining representative of the elevator field service employees (servicemen and repairmen) of Respondent as well as other elevator companies in the area. The president of Local 21 at the time of his discharge on December 5, 1980, was Charles McKinney, having served in that capacity for approximately 11 months prior to his discharge. Prior to serving as president of the Local, McKinney had served 3 years as vice president, from 1977 to 1980, and had served on the executive board of the Union between 2 and 3 years, encompassing parts of 1977, 1978, and 1979.

During the months immediately preceding his discharge on December 5, 1980, two incidents occurred which counsel for the General Counsel asserts form the true basis for the decision to discharge McKinney.

The first of such incidents directly involved McKinney's highly visible union activities. The collective-bargaining agreement between Respondent and the Union expired in June 1980 and, for a period thereafter, the parties were stalemated in negotiations. The Union decided to engage in a so-called part and walk. Respondent's employees, with a few exceptions, utilized their own vehicles in their work. On a day in June 1980, the employees drove to the Eulless office of Respondent, parked their cars in the parking lot, and refused to use them on company business. McKinney and a fellow employee named Bobby Stroud had company trucks and were told by District Supervisor Payne to utilize the company trucks and go to work. McKinney asked Payne if he wanted him and Stroud to deliver the other men to jobsites and pick them up but Payne replied that he did not have to

work for the other men. At this point, Stroud and McKinney refused to work and turned in the company vehicles saying they would not work when fellow union employees were being denied work by Respondent. This action on the part of McKinney and Stroud upset Payne, causing him to address the assembled employees in the parking lot stating, "What are you guys? Just a bunch of sheep? You're going to let some guy from the union hall play God and tell you whether you can work or not?"

The second occurrence involved McKinney's concern about the safety conditions at a job to which he was assigned, the Lakeland Manor job. It should be noted that McKinney was shown to be very concerned about safety conditions on the job for both himself and other employees. In fact, his campaign for president of the union local was based in large part on a platform of improving safety conditions for employees in the local. As pertinent, during the summer of 1980, McKinney called to the attention of management of Respondent a potentially dangerous situation at the Lakeland Manor facility. The pump units on which McKinney was called upon to work were installed too close to both the wall and the ceiling to allow work to be performed on them without the hazard of electrical shock. The degree of danger inherent in the Lakeland situation is not clear on the record, though McKinney was, on one occasion, shocked while working on the units and subsequently, as a result of an OSHA inspection, certain remedial work was done on the installation to make work safer.

McKinney first mentioned the Lakeland Manor situation in June 1980, while attending a company school, complaining to both of his immediate supervisors, Larry Huber and Jack Payne. During this meeting, McKinney was told by Payne that something would be done about the situation. Nothing was done immediately and, as McKinney was required to service the Lakeland Manor job two to three times a month, he continued to complain to Payne or Huber consistently throughout the fall of 1980. On each occasion in which a complaint was filed with supervisors, McKinney was told that something would be done about the job though nothing was done, until after an OSHA inspection following McKinney's discharge in December 1980.

C. Respondent's Alleged Reason for McKinney's Discharge

As part of Respondent's company procedures, it is customary for its servicemen's timecards to be turned in to the Eulless office on Thursdays. However, as Thursday, November 27, 1980, was a holiday, the employees were to turn in their timecards on the preceding Wednesday, November 26. In order to avoid the necessity of all employees delivering their cards to the Eulless office on Thursdays, it was at least an informal practice for the supervisor to designate one or more of the employees to rendezvous with the other employees, collect their cards, and deliver them.

On Wednesday, November 26, Supervisor Payne instructed McKinney to go to a service location and assist fellow employee Marshall Crouch on a job. McKinney proceeded to the jobsite. Upon arriving there at approxi-

mately noon, McKinney observed Crouch and another helper preparing to leave the location. Crouch and McKinney discussed the timecard situation and it was agreed upon by them that as Crouch was returning to Eules, in any event, that he would meet McKinney at a selected location and pick up his timecards as well as the cards of other employees who were working at that location. Both Crouch and McKinney testified that they proceeded in separate vehicles to the agreed-upon location. However, for the reasons which are not clear in the record, neither Crouch nor McKinney saw each other at the location and after waiting for each other for a period of time proceeded independently to the Eules office, both apparently frustrated and angry over what they felt was the inconsiderate treatment of one by the other.

McKinney arrived at the Eules location with fellow employees Bobby Stroud and turned in his tickets. Shortly thereafter, Crouch arrived at the office and turned in his tickets. Although both employees saw each other in the portion of the office where the tickets were to be turned in, neither spoke to the other. Thereafter, as McKinney and Stroud were preparing to leave the premises, departing through the parts department, they were approached by Crouch. Crouch demanded to know where McKinney had been, referring to their earlier mixup in their agreed-upon rendezvous. The exact words utilized by Crouch are in dispute, though it is clear that the tone and manner of the demand was abusive and threatening. A brief argument ensued with tempers apparently rising on both sides. As a result of this argument, a fist fight ensued which, though brief in duration, was evidently intense with both men suffering facial lacerations. As most fights do, this one ended with neither party being seriously injured and McKinney went to a restroom to clean up. During his absence, Crouch and Stroud then engaged in a brief struggle which ended almost as soon as it had begun.

Respondent bases part of its defense in this proceeding on its assertion that, in the incident between McKinney and Crouch, McKinney struck the first blow. McKinney contends that he threw the first blow in self-defense but management did not learn of this until after his discharge. No matter who threw the first blow in the fist fight, it is clear that employee Crouch was the instigator of the incident and was evidently spoiling for a fight as he variously engaged both McKinney and Stroud. Almost immediately after the two scuffles, all three involved employees, Crouch, Stroud, and McKinney departed the Company's premises with their differences apparently settled. Aside from the participants, only one employee, the Company's then parts man Ray Boring, observed the fist fight.

During the fight, Supervisor Payne was absent from the office. Thereafter, near closing time, Payne returned and was told about the fight by his secretaries and parts man, Boring. Upon being informed of the fight, Payne commented, "Oh hell, when are these boys going to grow up?" Boring testified that Payne "just kind of laughed about it," and later asked, "Who struck the first blow," but asked nothing else concerning the incident.

That evening, Payne went by Crouch's house to check on his condition and discussed the fight briefly with him

at that time. Thereafter, Payne reported the incident to his supervisor, Young, who directed Payne to conduct an investigation of the matter. After Payne had made an investigation he was to report the results to Young.

On the following Monday morning, Payne again discussed the fight with Crouch and was given a detailed description of the fight from Crouch's standpoint. From this discussion until after McKinney was fired, Payne did nothing more to learn about the incident. On the following Wednesday, December 3, 1980, McKinney was called into the office and learned that Jack Payne wanted to meet him at the Lakeland Manor jobsite about 8 o'clock, Friday morning. Accordingly, on Friday, McKinney went to the Lakeland Manor jobsite and met Payne who had arrived with another employee, a company salesman. Payne and McKinney went to the elevator area of Lakeland Manor where McKinney showed Payne the safety problem and again urged that it be corrected. During this conversation, Payne became angry with McKinney and suggested that they go to a restaurant and have some coffee. Payne, McKinney, and the salesman then went to a nearby restaurant where, immediately upon arrival, Payne excused himself to make a telephone call. Payne testified that he merely called his office asking for messages and denied talking to his supervisor, Young. On the other hand, Young testified that Payne called him on that morning and reported that his investigation of the fight indicated that McKinney had started it and threw the first punch. Young testified that he then gave Payne authorization to terminate McKinney. Payne testified that he did not need authority from Young to fire McKinney but that he had received such authority some 2 days earlier in a conversation about the fight with Young. Young had no recollection of that conversation at all.

After the phone conversation, Payne returned to the table and immediately requested that McKinney resign from the Company. When McKinney declined to resign, Payne fired him. To this point in the conversation, no mention had been made of the fight between McKinney and Crouch. McKinney then brought up the subject of the altercation and for the first time gave Payne his version of the incident. At no time during this conversation did Payne mention any other incident involving McKinney. Approximately a year prior to the fight with Crouch, McKinney had been involved in an altercation with Ray Boring, a witness to the fight and a current management employee with Esco. This scuffle had been observed by Young, who after breaking up the two men advised McKinney that he should not fight. However, neither McKinney nor Boring was given any formal reprimand or discipline as a result of the Boring incident. After Payne's conversation with McKinney at the restaurant ended, Payne had the salesman accompany McKinney to the company truck where he drove McKinney to a relative's house and returned the truck to the Company.

The other participant in the fight, Crouch, was not disciplined in any way. In fact, shortly thereafter, he received a substantial salary increase. He is still employed by Esco.

I find that the evidence supports the General Counsel's position that McKinney was fired for his union activities and activities toward improving the safety and working conditions on the Company's jobs. It appears equally clear to me that Payne simply seized upon the fight between McKinney and Crouch as a convenient reason to rid himself of McKinney. The lack of any comprehensive investigation into the fight before the termination, the disparate treatment given McKinney as compared with Crouch, and the timing and location of the discharge support this conclusion. Moreover, even after the discharge, when the complete facts about the fist fight came to light, no disciplinary action whatsoever was taken against Crouch. I find that the record indicates union animus on the part of Respondent and a strong animus by Payne toward McKinney because of his union and related safety activities. Consequently, I find that his discharge was for these reasons and not the reason advanced by Respondent. Accordingly, I find that Respondent has violated Section 8(a)(1) and (3) of the Act.

IV. THE REMEDY

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that Respondent be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

As I have found that Respondent has unlawfully discharged Charles McKinney, Respondent shall be required to offer to him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges and shall make him whole for any losses that he may have suffered by reason of the discrimination against him. All backpay due under the terms of this Order shall be computed, with interest, in a manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).¹

CONCLUSIONS OF LAW

1. Esco Elevators, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Elevator Constructors, Local 21, is a labor organization within the meaning of the Act.

3. By discharging Charles McKinney because of his union and protected activities in the advancement of safety conditions on the job, Respondent has engaged in unfair labor practices affecting commerce within the

meaning of Sections 8(a)(1) and (3) and Section 2(2), (6), and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²

The Respondent, Esco Elevators, Inc., Fort Worth, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against its employees in regard to hiring, tenure of employment, or any term or condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action, which it is found, will effectuate the policies of the Act:

(a) Offer Charles McKinney immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any losses that he may have suffered by reason of the unlawful conduct involved herein, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its place of business in Fort Worth, Texas, copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Preserve and make available to the Board or its agent, upon request, all records necessary to analyze the amount due in the effectuation of this remedial Order.

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps have been taken to comply.

² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).